FEDERAL RULE 35 HELD APPLICABLE TO DEFENDANTS IN PERSONAL INJURY SUITS

Schlagenhauf v. Holder
379 U.S. 104 (1964)

Passengers of a Greyhound bus sued for injuries sustained when the bus collided with the rear of a tractor-trailer. The bus company and its driver, Schlagenhauf, were joined with the owners of the tractor-trailer as defendants. The bus company cross-claimed against the owners of the tractor-trailer for damages due to their negligence. The tractor company's answer denied negligence and asserted negligence on the part of Schlagenhauf. It also alleged he was not "physically or mentally capable" of driving the bus and petitioned for physical and mental examinations pursuant to Rule 35(a) of the Federal Rules of Civil Procedure.[1] A writ of mandamus challenging the order was denied in the Seventh Circuit Court of Appeals with one judge dissenting.[2]

The Supreme Court held[3] that rule 35 applies to defendants in personal injury actions as well as plaintiffs, and that as applied is constitutional and authorized by the Rules Enabling Act.[4] The Court further held that though the person to be examined must be a party to the suit, he need not be a party with respect to the movant; therefore, a court could order the examination of a defendant on the motion of a co-defendant even though there was no cross-claim between the movant and the party to be examined.[5] The Court concluded in the instant case that the examination should not have been ordered since the movant had failed to show good cause and to show that the mental or physical condition of the driver was in controversy as required by the rule.[6]

---

[1] Fed. R. Civ. P. 35(a) provides:

> In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

[2] Schlagenhauf v. Holder, 321 F.2d 43 (7th Cir. 1963).

[3] Schlagenhauf v. Holder, 379 U.S. 104, 114 (1964).

[4] 28 U.S.C. § 2072 (1964).

[5] Schlagenhauf v. Holder, *supra* note 3, at 116.

[6] *Id.* at 119-21. Mr. Justice Black and Mr. Justice Clark dissented in part on the grounds that "there *was* a controversy as to Schlagenhauf's mental and physical health and that 'good cause' *was* shown for a physical and mental examination of him . . . ." Schlagenhauf v. Holder, *supra* note 3, at 122 (dissenting opinion). Mr. Justice Douglas dissented on the basis that rule 35 should not be applied to defendants in personal injury cases. Mr. Justice Harlan dissented because he considered mandamus an improper remedy.

As to whether a court has the power to subject a party to physical or mental examination,[7] the majority of states have held that the courts have an inherent power to order an examination of a personal injury plaintiff to determine the extent of injury,[8] while a substantial minority have held otherwise.[9] The leading federal case prior to the adoption of rule 35 was *Union Pac. Ry. v. Botsford*[10] in which the Supreme Court held that every individual has the right to the "possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."[11] After discussing the common law decisions, the Court ruled that the federal courts have no right or power to order the physical examination of a plaintiff in a personal injury suit. In a later case[12] the Court reaffirmed that there is no inherent power to order the examination, but narrowed its earlier decision by holding that pursuant to the Rules of Decision Act,[13] a federal court could order a physical examination of a party if a state statute authorized such an order.

In 1938, rule 35 was adopted to conform to the practice in a number of states.[14] The rule authorizing the federal courts to order a party to submit to a physical or mental examination by a physician when the physical or mental condition is in controversy and good cause has been shown.[15] The validity of this rule was tested in *Sibbach v. Wilson & Co.*,[16] in which the Supreme Court held the rule constitutional as applied to a plaintiff in a personal injury suit, and not in violation of the Rules Enabling Act,[17] which authorizes rules which do not abridge, enlarge, or modify any

---

[7] See generally 8 Wigmore, Evidence § 2220 (McNaughton ed. 1961).

[8] See, *e.g.*, Alabama G.S. Ry. v. Hill, 90 Ala. 71, 8 So. 90 (1890); Richmond & D.R.R. v. Childress, 82 Ga. 719, 9 S.E. 602 (1889); South Bend v. Turner, 156 Ind. 418, 60 N.E. 271 (1901); Ottawa v. Gilliland, 63 Kan. 165, 65 Pac. 252 (1901); Drake v. Bowles, 97 N.H. 474, 92 A.2d 161 (1952); Flythe v. East Carolina Coach Co., 195 N.C. 777, 143 S.E. 865 (1928); Kresge v. Trester, 123 Ohio St. 383, 175 N.E. 611 (1931); Carnine v. Tibbetts, 158 Ore. 21, 74 P.2d 974 (1937); Williams v. Chattanooga Iron Works, 131 Tenn. 683, 176 S.W. 1031 (1915).

[9] See, *e.g.*, Stack v. New York, N.H. & H.R.R., 177 Mass. 155, 58 N.E. 686 (1900); Yazoo & M.V.R.R. v. Robinson, 107 Miss. 192, 65 So. 241 (1914); Atchison T. & S.F. Ry. v. Melson, 40 Okla. 1, 134 Pac. 388 (1913); Austin & N.W.R.R. v. Cluck, 97 Tex. 172, 77 S.W. 403 (1903).

[10] 141 U.S. 250 (1891).

[11] *Id.* at 251.

[12] Camden & Suburban Ry. v. Stetson, 177 U.S. 172 (1900).

[13] 28 U.S.C. § 1652 (1964) provides: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

[14] See 4 Moore, Federal Practice 2552-53 (2d ed. 1963).

[15] Fed. R. Civ. P. 35(a). Several states have provisions substantially similar to the federal rule. See, *e.g.*, Ariz. R. Civ. P. 35; Ark. Stat. Ann. § 28-357 (1962). For a complete listing see 2A Barron & Holtzoff, Federal Practice and Procedure 476 (Wright ed. 1961).

[16] 312 U.S. 1 (1941).

[17] 28 U.S.C. § 2072 (1964).

substantive rights. The cause of action in *Sibbach* arose in Indiana but was tried in an Illinois district court.

The petitioner admitted the rule to be procedural since an interpretation of the rule as substantive would result in the application of the law of Indiana [18] which permitted the examination of personal injury plaintiffs.[19] Rather, the petitioner argued that the rule was not authorized by the Enabling Act. She contended that the prohibition in the act against abridging substantive rights meant no important or substantial rights could be abridged and that the right to be free from examination was such a right.[20] This distinction was rejected by the Court, which held that since the rule was procedural it was valid. Mr. Justice Frankfurter, speaking for the dissent, conceded that the rule was procedural and that there was no constitutional immunity from examination, but argued that the rule represented a drastic change in the public policy which controlled the *Botsford* [21] decision and therefore such a change would require specific legislation.[22] Since, in the *Sibbach* case, the rule was conceded to be procedural, it is arguable that the Court in the principal case placed too much reliance on it in holding the examination to be constitutional.[23]

Although the most frequent use of rule 35 has been to require the examination of a plaintiff in a personal injury suit,[24] the question in the principal case of whether the rule could properly be applied to the defendant was a matter of first impression in the federal courts.[25] The petitioner argued that there is a constitutional right to be free from mental or physical examination, and attempted to distinguish the *Sibbach* case, in that *Sibbach* involved the examination of a personal injury plaintiff who had waived his constitutional right by bringing the action.[26] The Court, conceding that some early state cases had proceeded on the waiver theory, concluded that *Sibbach* was not so decided. The Court stated that even if there exists a constitutional right to be free from mental or physical examination, it

---

[18] Aparently on the theory that the Illinois courts would have applied Indiana law.

[19] South Bend v. Turner, *supra* note 8.

[20] Sibbach v. Wilson & Co., *supra* note 16, at 11.

[21] Union Pac. Ry. v. Botsford, *supra* note 10.

[22] *Supra* note 16, at 18 (dissenting opinion).

[23] In Sibbach v. Wilson & Co., *supra* note 16, at 9, the Court admitted the limitation of the case when it stated:

> The contention of the petitioner, in final analysis, is that Rules 35 and 37 are not within the mandate of Congress to this court. This is the limit of permissible debate, since argument touching the broader questions of Congressional power and of the obligation of federal courts to apply the substantive law of a state is foreclosed.

[24] See, *e.g.*, Little v. Howey, 32 F.R.D. 322 (W.D. Mo. 1963); Gale v. National Transp. Co., 7 F.R.D. 237 (S.D.N.Y. 1946); Leach v. Greif Bros. Cooperage Corp., 2 F.R.D. 444 (S.D. Miss. 1942).

[25] *But see* Dinsel v. Pennsylvania R.R., 144 F. Supp. 880 (W.D. Pa. 1956), in which the court indicated its belief that it has the power in the proper case to order the examination of an employee of the defendant, where it is contended that the defendant was negligent in hiring the employee who caused the injury to the plaintiff.

[26] Schlagenhauf v. Holder, *supra* note 3, at 113.

would be untenable to say it could be waived by the seeking of redress for injuries received through no voluntary act of the plaintiff.[27]

The difficulty with the petitioner's argument was in finding an express provision in the Constitution which would prevent the examination. However, subsequent to the decision in the principal case, the Supreme Court has struck down a state anticontraceptive law, as a violation of a federal right to privacy.[28] The Court considered this right to be underlying several of the provisions of the Bill of Rights. If such a right exists, it would appear that it could also be violated by a rule requiring citizens to submit to a physical or mental examination, if such rule be applied unreasonably.

However, a New Jersey statute authorizing the courts to direct any party to the action involving parentage or identification to a blood grouping test,[29] has been held not to violate the right of personal privacy[30] found in the state constitution.[31] Furthermore, it was held not to violate the privilege against self incrimination, since that privilege involved only testimonial proof.[32] In a recent case, the Supreme Court of Oklahoma ordered a lower court to compel a child, whose paternity had been denied by a defendant in a paternity suit, to submit to a blood grouping test.[33] The examination was held not a violation of the due process clause of the federal constitution or the constitutional right of privacy.[34] These cases are distinguishable in that they involved only blood grouping tests, which one court was careful to point out, was "harmless and practically painless." [35]

It therefore appears that in order to avoid constitutional difficulties there must be adequate safeguards built into the rule to prevent its unreasonable use. Rule 35 on its face applies only to parties. This limitation has been strictly construed for the courts have not even considered the parents of a petitioner in a nationality suit within the rule.[36] Furthermore

[27] Schlagenhauf v. Holder, *supra* note 3, at 114. Moreover, the Court suggested that to hold that a person may waive a right by exercising his right to seek federal jurisdiction might create constitutional problems.

[28] Griswold v. Connecticut, 381 U.S. 479 (1965).

[29] N.J. Stat. Ann. § 2A:83-3.

[30] Cortese v. Cortese, 10 N.J. Super. 152, 76 A.2d 717 (App. Div. 1950); Anthony v. Anthony, 9 N.J. Super. 411, 74 A.2d 919 (App. Div. 1950).

[31] N.J. Const. art. I, ¶ 1.

[32] Anthony v. Anthony, *supra* note 30, at 416, 74 A.2d at 921.

[33] State *ex rel.* Evertson v. Cornett, 391 P.2d 277 (Okla. 1964).

[34] *Id.* at 280.

[35] Anthony v. Anthony, *supra* note 30, at 417, 74 A.2d at 922. See Haynes v. Haynes, 43 N.Y.S.2d 315 (Sup. Ct. 1943), for a similar holding where a plaintiff in an action for divorce moved for an order requiring his wife to submit to a physical examination to determine if she were pregnant. It was held that such examination would violate her "constitutional rights" although if and when the child was born, an application for a blood grouping test might be entertained.

[36] Dulles v. Quan Yoke Fong, 237 F.2d 496 (9th Cir. 1956); Fong Sik Leung v. Dulles, 226 F.2d 74 (9th Cir. 1955); Chin Nee Deu v. Dulles, 18 F.R.D. 350 (S.D.N.Y. 1955); Yee Szet Foo v. Dulles, 18 F.R.D. 237 (S.D.N.Y. 1955). However in Lee Wing Get v. Dulles, 18 F.R.D. 415 (E.D.N.Y. 1955), the court allowed

an employee of a party has been held not subject to the rule. In *Kropp. v. General Dynamics Corp.*,[37] the plaintiff sued the owner of a truck for damages for injuries sustained when he was struck by the truck. The court held that since the driver was not a party to the suit, he could not be compelled to submit to a physical examination to determine his qualifications to drive. It should be noted that the principal case differs from *Kropp* only in that the driver of the bus was named by the plaintiff in the original petition. This distinction seems artificial and has caused one notator to suggest that the proposed amendment, which would expand the rule to include the blood relationship of a party or an agent or person in the custody or under the legal control of a party,[38] should have been adopted.[39] Although this proposal has not been adopted, several states now have such a provision.[40]

Another limitation in the rule is that the physical or mental condition of the party to be examined must be in controversy. The meaning of this provision has not been frequently litigated in the federal courts. Since rule 35 is the only one of the discovery rules in which this requirement appears, it is likely that the promulgators of the rule meant something more to be shown than mere relevancy "to the subject matter involved in the pending action" which is required in rule 26(b)[41] and is applicable to all the discovery rules.[42]

One of the first cases under rule 35 involved the interpretation of the "in controversy" provision.[43] Defendant, who was charged with having made certain libelous statements concerning the plaintiff's physical and mental condition, moved for examinations of plaintiff in order to prove truth. In holding the condition of the plaintiff not to be in controversy, the court limited the rule to the examination of personal injury plaintiffs who put their own condition "immediately and directly in controversy."[44] This view was promptly rejected by the District of Columbia Circuit Court in *Beach v. Beach.* [45] The court approved of a blood grouping test of the plaintiff in a paternity suit and also of the child whose paternity was in issue. The child was a party within the meaning of the rule because he was the

---

a blood grouping test of the mother of the plaintiff in a nationality suit, by a questionable reliance upon a state statute which allowed such an examination.

[37] 202 F. Supp. 207 (E.D. Mich. 1962). See generally Note, "Physical Examination of Non-Parties Under the Federal Rules of Civil Procedure," 43 Iowa L. Rev. 375 (1958).

[38] Report of Proposed Amendments to Rules of Civil Procedure for the United States District Courts 29 (Oct. 1955), quoted in 4 Moore, Federal Practice § 3501, at 2552 (Supp. 1964).

[39] Note, 74 Harv. L. Rev. 940, 1024 (1961).

[40] Cal. Civ. Proc. Code § 2032 (Supp. 1964); Idaho R. Civ. P. 35; Minn. R. Civ. P. 35; N.D.R. Civ. P. 35; Wyo. R. Civ. P. 35.

[41] Fed. R. Civ. P. 26(b).

[42] Wright, Federal Courts 309 (1963).

[43] Wadlow v. Humberd, 27 F. Supp. 210 (W.D. Mo. 1939).

[44] *Id.* at 212.

[45] 114 F.2d 479 (D.C. Cir. 1940).

real party in interest.[46] The physical condition of the plaintiff and the child were said to be in controversy because there was a conflict concerning such condition which underlied the issue of paternity.[47]

After the *Beach* case, it was extremely difficult to determine what meaning, if any, to attach to the "in controversy" requirement. The principal case held that neither the good cause nor the "in controversy" standards were satisfied but did little to clarify their meaning. There was some indication that if the movant had, through affidavits or possibly in an evidentiary hearing held for that purpose, alleged specifically what he believed wrong with the petitioner, the examination would have been allowed.[48] Although this type of inquiry might be appropriate for the determination of good cause, it has little relevance to whether or not the physical or mental condition of a party is in controversy. Thus, the opinion of the Court implies that the "in controversy" provision of the rule adds little to the requirement that good cause be shown.

Mr. Justice Douglas,[49] although conceding the rule to be constitutional, contended that the "in controversy" requirement precludes its use on a defendant in a personal injury suit. The plaintiff, by suing, puts his condition immediately and directly in controversy, but when the rule is applied to a defendant, the issue is whether or not he is negligent, and though his physical or mental condition may be relevant to that issue, such condition is not the ultimate issue. Following this reasoning, however, the physical or mental competence of the driver would have been an ultimate issue and the examination should have been ordered [50] since the plaintiff had charged the owners of the bus with negligence in entrusting it to the driver.

In support of Mr. Justice Douglas' contention that the rule does not extend to personal injury defendants, he listed several dangers inherent in such application. Since almost every licensed driver suffers from some ailment, a rule, which delivers the defendant to the plaintiff's doctors in search of anything which would prove the defendant unfit to perform the acts which resulted in the plaintiff's injury, would sanction a fishing expedition.[51] Also Mr. Justice Douglas suggested that there is the possibility of blackmail; the defendant may be less likely to defend an erroneous suit, because of the threat of submission to a physical or mental examination.[52] Although these dangers are great and an unreasonable use of the rule could even cause constitutional difficulties, they seem less formidable in the light of the other safeguards built into the rule. The danger of a

---

[46] Support was found for the contention that the word "party" included the real party in interest from rule 17(a) which authorizes a party to sue in his own name without joining the *party* for whose benefit the action is brought.

[47] Beach v. Beach, *supra* note 45, at 482.

[48] Schlagenhauf v. Holder, *supra* note 3, at 120.

[49] Schlagenhauf v. Holder, *supra* note 3, at 126 (separate opinion).

[50] In Harabedian v. Superior Court, 195 Cal. App. 2d 26, 15 Cal. Rptr. 420 (Ct. App. 1961), it was held with little discussion that such an examination should be ordered under a rule similar to rule 35.

[51] Schlagenhauf v. Holder, *supra* note 3, at 125 (separate opinion).

[52] *Id.* at 127.

fishing expedition and the possibility of blackmail are reduced by the requirement in the rule that the order of the court specify the scope of the examination. Furthermore, the movant does not have an absolute right to name the examining physician.[53] This permits the court to appoint a doctor who in its judgment would limit the inquiry to the issues specified, and give a fair and accurate account of the extent of the physical or mental defects of the person to be examined.

The rule also states that an examination can be made only on motion for good cause shown. One court has suggested that this standard should be strictly construed in view of the obvious danger of an invasion of the individual's privacy by a physical or mental examination.[54] If the examination is not necessary for the determination of the issues, it will not be ordered. Thus, it was not error to refuse to order an examination where the movant could have obtained the desired medical reports by some other method.[55] Similarly, where the plaintiff had previously submitted to a physical examination, it was held not error to deny defendant's motion to require plaintiff to produce, for the benefit of defendant, reports of plaintiff's own physicians concerning the same injuries,[56] under rule 34 providing for production of documents on motion of any party showing "good cause therefor." Courts are also reluctant to order an examination which would be extremely painful,[57] or which would endanger the health of the person to be examined.[58]

As a rule, many courts order the examination of personal injury plaintiffs as a matter of course with very little showing of good cause.[59] In refusing the examination in the instant case, the Court disapproved of this procedure. The movant had alleged in his pleading that the "eyes and vision" of the petitioner were impaired and deficient.[60] A supporting affidavit stated that the petitioner admitted having seen red lights for ten to fifteen seconds prior to the collision, that an eye witness saw the truck clearly for a distance of three-fourths to one-half mile, and that Schlagenhauf admitted having been previously involved in a similar rear end collision.[61]

The Court conceded that these allegations may have given the trial court sufficient cause to warrant an eye examination, but since there were

---

[53] Gitto v. Societa Anonima Di Navigazione, 27 F. Supp. 785 (E.D.N.Y. 1939).

[54] Guilford Nat'l Bank v. Southern Ry., 297 F.2d 921 (4th Cir. 1962).

[55] Martin v. Tindell, 98 So. 2d 473 (Fla. 1957).

[56] Benning v. Phelps, 249 F.2d 47 (2d Cir. 1957).

[57] Klien v. Yellow Cab Co., 7 F.R.D. 169 (N.D. Ohio 1944).

[58] Strasser v. Prudential Ins. Co., 1 F.R.D. 125 (W.D. Ky. 1939).

[59] In Martin v. Tindell, *supra* note 55, at 475, the court said: "We realize that motions for compulsory physical examinations in personal injury actions are usually granted as a matter of course by trial judges, and that it is the common practice of attorneys to file a perfunctory motion such as was filed here." In Leach v. Greif Bros. Cooperage Corp., 2 F.R.D. 444 (S.D. Miss. 1942), an affidavit in support of a motion, stating the defendant does not believe the plaintiff to be injured as severely as he contends, was held sufficient.

[60] Schlagenhauf v. Holder, *supra* note 3, at 120.

[61] *Ibid.*

not specific allegations in the pleadings or affidavits to "afford a basis for belief" that there was any other physical or mental defects, none of the examinations would be approved, and the case was remanded to the district court to reconsider in the light of the guidelines set forth.[62]

It is difficult to determine from the opinion what these guidelines are. In some cases an evidentiary hearing may be required, but it is not clear what types of cases will require such a hearing or how much evidence would be considered thereat. The lower court's opinion in this case suggested one test, *i.e.,* the movant should be required to show (1) the probability that the adverse party's condition is relevant and proximate in point of time to the issues of the case, and (2) good cause to believe the examination would best serve to ascertain the truth and no other means of discovery would be as satisfactory in that regard, but with due regard to the party's interest in personal privacy. This test involves a balancing between the need for the examination in each case, and the party's interest in privacy.[63] Thus, a court would be more likely to allow an examination where it is necessary to determine an ultimate issue in the case. Also the degree to which the particular examination would be susceptible to abuse should be considered. For example, the threat of a mental examination would be more likely to deter a defendant from opposing an erroneous claim than would the threat of an eye examination. Therefore, it would be proper to require more cause to be shown before a mental examination is ordered than for an eye examination.

In conclusion, there are more dangers involved in the application of rule 35 to defendants than to plaintiffs, including an unreasonable invasion of a party's personal right to privacy. The Court, however, was unsuccessful in providing meaningful guidelines for the lower courts in applying the good cause and "in controversy" requirements to avoid such dangers. It is suggested that the test of the lower court is logically sound and should provide a fair balance between the various interests involved.

---

[62] Schlagenhauf v. Holder, *supra* note 3, at 122.

[63] Schlagenhauf v. Holder, *supra* note 2, at 50.